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No. 454

In the Supreme Court of the United States

OCTOBER TERM, 1959

AARON SUSSMAN AND HARRY D. NASSAU,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 47-50) is not yet reported. The opinion of the district court denying a motion for new trial (R. 859-871) is reported at 168 F. Supp. 531.

JURISDICTION

The judgment of the court of appeals was entered August 21, 1959. On September 17, 1959, Mr. Justice Brennan entered an order extending the time to file a petition for a writ of certiorari to and includ-

ing October 5, 1959. The petition for a writ of certiorari was filed October 5, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict that the petitioners knowingly received, and conspired to receive, stolen government property.

2. Whether evidence of activities of conspirators before the petitioners joined the conspiracy was properly received as constituting part of a single scheme.

3. Whether the absence of a transcript of the testimony before a grand jury invalidates an indictment on the theory that it prevents a defendant from showing that there was no evidence of any sort before the grand jury.

4. Whether the petitioners received a fair trial in other respects.

STATEMENT

On November 21, 1957, an indictment was returned in the District Court for the Eastern District of Pennsylvania against the petitioners and others, charging substantive violations of 18 U.S.C. 641 and a conspiracy to violate the statute (R. 4-26).

Petitioner Sussman was charged in thirteen substantive counts with knowingly receiving stolen property of the United States [1] and in eight of those petitioner Nassau was named a codefendant. Other counts, in which the petitioners were not named,

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[1] Counts III, V, VII, IX, XI, XIII, XIX, XXI, XXIII, XXV, XXVII, XXIX, XXXI.

charged a number of persons with theft of government property. The conspiracy count named the petitioners and eight others as defendants and named five co-conspirators. It charged a continuing conspiracy of theft and disposal of government property from 1950 to 1956.

Only the petitioners and another of the defendants, Spalazzo, charged with the substantive counts of stealing the property, went to trial.[2] The petitioners were found guilty on all counts in which they were named (R. 844-846). On November 26, 1958, the petitioners were each sentenced to one year's imprisonment on each of the counts (including the conspiracy count), save two, the sentences to run concurrently. On the remaining two counts, sentence was suspended and the petitioners placed on probation for a period of one year, to begin upon the expiration of the imprisonment and to be conditioned upon payment of a fine of $1000 within ninety days of the start of the probationary period (R. 872-873). A motion for new trial had previously been denied by the district court (R. 859-871). On appeal, the convictions were affirmed (Pet. 47-50).

The proof is summarized in detail in the opinion of the district court, R. 859-871, 168 F. Supp. 531. In brief, the evidence, largely from co-defendants who pleaded guilty, showed that a group of employees in the quartermaster corps (including Spalazzo, the co-defendant on trial) started stealing cloth in 1950.

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[2] Six of the ten defendants pleaded guilty to the indictment, and a continuance was granted as to a seventh.

They would call Martin Weiner who would drive a truck to the warehouse designated, pick up the material, and subsequently pay the thieves (R. 353-355, 387-393). The transactions were financed by David Stolper's mother, with Stolper and Martin Weiner receiving a commission when they succeeded in disposing of the stolen cloth (R. 52). Sales were made and payments received in the fictitious name Myron Wexler and a bank account was carried in that name (R. 68-69, 312-313, 322-323, 646). The sales were made to legitimate concerns (R. 646). Lichtman was hired by Weiner as a salesman (R. 65). Lichtman testified that he was not aware until 1953 that the cloth was being stolen, acquiring knowledge of that fact "bit by bit", chiefly from talking to Weiner (R. 646-648).

One of the purchasers of the cloth, the American Braid Supply Company of New York, went bankrupt, and apparently in connection with the bankruptcy proceedings, there was an F.B.I. investigation (R. 140, 650). The "Myron Wexler" account gave Martin Weiner's store address, and he was approached by an F.B.I. agent in 1952 (R. 72). Martin Weiner testified that he stopped stealing out of fear of detection after this interview (R. 72). Also in 1952, David Stolper's mother died, and Stolper and Weiner parted company, dividing up the money remaining in the "Myron Wexler" bank account (R. 324-327).

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[3] Stolper was not permitted to testify concerning his own later activities, which did not involve Weiner or the petitioners, the district court ruling that this concerned a separate conspiracy (R. 314-318). Pursuant to this ruling,

In 1954, Weiner testified Lichtman approached him about resuming operations, saying he had an outlet which was safe because the goods were to be exported (R. 72). Lichtman testified that Weiner approached him about resuming operations (R. 650). There was a meeting in Weiner's store in 1954 among Weiner, Lichtman, petitioner Sussman and others (R. 73). Weiner testified as to this meeting (R. 73-74):

> Mr. Sussman was very concerned if my end of receiving the cloth was safe, whether there was any possibility of me being caught, because he said his end, Mr. Sussman said his end was perfectly safe, that he was shipping the cloth out of the country, and I assured him that my end, when I went in to get the cloth, that there was no record left of me going in or out, the passes were destroyed, and there was no possible way that they could trace me to the cloth; and Mr. Sussman said, "If your end is as safe as my end, then we will have nothing to worry about and we will make a lot of money".

The arrangement was that Weiner was to take the cloth from the quartermaster and have the tickets removed.[4] Lichtman would take care of the sale and collection. Petitioner Sussman, and his partner of that time, Suskin, would pay for the cloth in cash

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Counts 32 to 40, involving only Spalazzo, were dismissed, since they concerned Spalazzo's subsequent dealings with Stolper (R. 345-347).

[4] This was the same operating procedure as before (see R. 56, 58-59).

(R. 78). Weiner testified (R. 78):

> * * * Mr. Sussman informed me that he had a setup for billing this merchandise, because we questioned where he would get the large amounts of cash that was necessary, and he said that they had other dealings, Mr. Sussman told me, they had a setup in a phony name and an arrangement with a bank that didn't do any recording, in Newark somewhere, whereas he could make, Mr. Sussman could make, a check out to this fictitious name and the teller would cash the check for him and there would be no record of it.[5]

The first sale to Sussman was of Air Force blue material which Weiner had received before he suspended his activities in 1952 (R. 71, 73). This was the time Lichtman and Sussman assured him that the cloth would be shipped out and there would be no problem of tracing it (R. 73).

Thereafter, stealing operations were resumed as before (R. 73, 77, 83-84). Lichtman and Weiner divided the proceeds left from the sale after paying the men who did the stealing (R. 85). Petitioner Nassau became Sussman's partner in 1955, in place of Suskin (R. 89). At one time Weiner met Nassau at the sponger's (R. 90). On one occasion Weiner took a ticket from the cloth to both the petitioners who said they wanted to see the name of the mill, and promised to destroy it (R. 91, 103). They also told Weiner they were working on the cloth to try to strip out the original color (R. 91). Lichtman's

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[5] The names used at this time were "Samuel Miller" and "Samuel Metzger" (R. 101, 661, 675).

account of his dealings with the petitioners was that at the end of 1953 Sussman and Suskin came to him after Lichtman mentioned to a friend that he was looking for people who would pay cash (R. 651-653). He said he sold them Air Force blue when Weiner had not been able to deliver goods as he promised (R. 656-657.) He also said that at the meeting in Weiner's store when Weiner said he needed cash "that he pays the Quartermaster for them in cash, that he has no credit" (R. 657), Sussman or Suskin agreed to pay cash. They had said they had a company under the name of Samuel Miller through which the cash could be obtained (R. 657-658, 661). Lichtman testified that Sussman and Suskin asked Weiner if his end was all right with no discussion of theft at that time (R. 658); Mr. Sussman did say the goods were going overseas (R. 662).[6] Lichtman also stated that in August 1955, he told the petitioners how the goods were stolen and Sussman said he had learned about it from Mr. Chorney, a co-conspirator (R. 681).

The substantive counts against petitioner Sussman relate to thirteen loads of stolen goods sold between February 17, 1954, and March 14, 1956, in eight of which petitioner Nassau was involved.

ARGUMENT

1. In submitting the case to the jury on the substantive counts, the judge charged in part (R. 833-834):

[6] In fact the petitioners sold the goods domestically (R. 101).

I charge you that you may not find either defendant Aaron Sussman or Harry D. Nassau guilty of the substantive crimes of receiving stolen Government property unless you first find beyond a reasonable doubt as to each that he knew the property he was purchasing or receiving was in fact stolen. I charge you that such knowledge of the stolen character of the property, the Government cloth, must be established to your satisfaction from all of the evidence beyond a reasonable doubt. You may not convict these defendants or either of them upon mere probability, presumption, speculation or suspicion that the goods they were purchasing were stolen, and that they should have known or realized that they were in fact buying stolen property. In view of the testimony of the Government witnesses Martin Weiner and Martin D. Lichtman, you must find first that the defendants had actual direct knowledge of the stolen character of the cloth they were buying. If you find that the defendants Sussman and Nassau did not have that direct actual knowledge as to any or all of the counts in which they are named, then I charge you it is your duty to acquit such defendants as to each or all of them. Again I repeat, you should consider all of the evidence including the testimony of Mr. Weiner and Mr. Lichtman.

As you recall, that was directly contradicted by the defendants; that is, the testimony of Weiner and Lichtman.

Despite the jury's verdict, the petitioners contend that the evidence is legally insufficient to sustain the convictions because two government witnesses gave different versions bearing on when the petitioners

acquired guilty knowledge of the workings of the conspiracy. Actually the two versions are not materially different except that Weiner's version indicated more explicit reference on petitioner Sussman's part to knowledge of the stolen character of the goods. Although Lichtman testified that nothing was said about theft, his testimony and Weiner's coincided on the point that Sussman referred to everything being all right on Weiner's end; that Sussman said the cloth was going overseas; and that Sussman said they could pay cash through the Samuel Miller account. Moreover, even accepting the more favorable testimony, that of Lichtman, guilty knowledge is still attested to as of a later date. Lichtman stated that he himself told both the petitioners in August 1955 of the way the theft was handled, and that Sussman said at the time that he had been already aware of the nature of the operation. And as stated by the district court in denying the motion for new trial (R. 871):

> In addition to such direct testimony of guilty knowledge, there were inferences of guilt raised by many acts of the defendants. The Quartermaster tickets, mill marks, proof or truth marks, were all removed from the stolen cloth in the presence of the defendants. Sussman and Nassau likewise forged the endorsement of "Samuel Miller" on the numerous checks made out in that name. Sussman also had an "extensively" greater quantity of uniform cloth for sale than anyone else during this period, and apparently could offer for sale some types of cloth which even the mills could not supply. The

prices paid by Sussman and Nassau for the stolen cloth were likewise considerably below the current market.

To hold that the jury did not have a sufficient basis upon which to find the requisite guilty knowledge on the part of the defendants would be utterly unrealistic * * *.

2. In the face of the specific charge on the substantive counts and the evidence supporting the verdict on those counts, the petitioners' allegations with respect to the conspiracy count, on which the petitioners received concurrent sentences, cannot affect the validity of the judgment. However, the petitioners contend that the evidence of the activities of Weiner and his co-conspirators before 1952 should not have been admitted because, in view of the cessation of activities, it concerned a separate conspiracy from the one in which they were charged with participating commencing in 1954. The petitioners do not challenge the established rule that one joining a conspiracy at its later stages is responsible for what has gone before, but argue that this rule does not apply to them because the pre-1954 acts, they claim, were a separate conspiracy. However, the first cloth sold to Sussman and his then partner was cloth stolen during the period before Weiner temporarily suspended operations and, as noted above, there is ample evidence to indicate that the petitioners knew, from the time they joined the conspiracy, that they were dealing in stolen goods even if they did not learn the full details of the operation until later.

The conspiracy as a whole was one, although operations were suspended for a time and the petitioners

entered at the later stage. Weiner was the key man all through the conspiracy, since it was he whom the depot employees notified whenever cloth was available, and who actually went into the depot to steal the cloth. Weiner ceased operations for a time for fear of detection, but as we have noted did not dispose of the cloth last taken in 1952 until he found in the petitioners what he considered a safe outlet, and then immediately resumed the former activities. Thefts were made whenever Weiner was assured of two things: that cloth was available at the depot (which information was given him by the employees) and that it could be disposed of on the outside without serious risk of detection.[7] The suspension, while a safe outlet was not available, did not change the nature of the conspiracy.[8]

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[7] The district judge noted that five of the government employees who had pleaded guilty had been charged with thefts occurring in 1953. Although these thefts did not involve Weiner or the petitioners, it is a further indication that Weiner was held back from continuing his thefts for the moment only by his fear that the method of disposal was unsatisfactory (R. 860-861).

[8] The petitioners allege that the case at bar is in conflict with *United States* v. *Russano*, 257 F. 2d 712 (C.A. 2), where it was held that conspiracies before and after a cessation were separate. The difference between the two cases is not one of law but of fact. In *Russano*, the narcotics conspiracy shown in that case stopped with the arrest of two of the "middlemen" near the end of 1952. When the group began operations again in 1955, it was held by the Court of Appeals for the Second Circuit to be a separate conspiracy. Here, however, the "middleman" was in the picture at all times, resuming activities when he had an outlet and disposing then of goods earlier stolen.

In any event, the trial court submitted to the jury, under proper instructions (R. 831), the question of whether the government had established its allegation that a single conspiracy existed. The jury found for the government as a matter of fact and there is no ground for review of that decision in this Court.

3. A prior indictment had been returned on February 21, 1957, against eight named conspirators as defendants (R. 874). Five of the eight pleaded guilty (R. 874). The indictment already mentioned was then returned, naming the petitioners, the co-defendant Spalazzo, and several others for the first time, as well as two of the three who had not pleaded guilty to the previous indictment (R. 4).

During the trial, the district court directed that any grand jury notes of testimony by any witnesses called by the government be given to defense counsel in addition to the statements made to the F.B.I. (R. 334). The Assistant United States Attorney stated that some testimony before the grand jury was not taken down (R. 335). Defense counsel moved for a mistrial, urging that a reversal of a conviction would be required if any witness took the stand whose grand jury testimony had not been transcribed. This was denied (R. 334-339).

At the conclusion of the government's case, counsel for the petitioners moved to dismiss every count of the indictment in which they were named (R. 815):

> on the ground that there had been no proof by any witness who has appeared and testified for the Government that there was any evidence of any kind or nature whatsoever against them ad-

duced before the grand jury; that therefore the indictment is not founded on such credible evidence which will sustain the finding of an indictment.

They also urged that the failure to transcribe the notes of the testimony on which the instant indictment was returned constituted a violation of Rule 6, F.R. Crim. P., and of due process. The district court denied the motion to dismiss (R. 816-817).

There is no merit in the petitioners' contention that a reversal of the conviction is required because none of the government's trial witnesses admitted giving testimony before the grand jury which indicted the petitioners. The fact that the witnesses may not have testified before the grand jury does not show there was no evidence. Indeed the record indicates there was an extensive F.B.I. file on the case and much documentary proof. There is no showing that the grand jury was improperly constituted. The holding of this Court in *Costello* v. *United States*, 350 U.S. 359, 363, is therefore conclusive: "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits".

The petitioners' chief argument is that it was a denial of due process not to have a stenographer present to take down the testimony before the grand jury. Their position admittedly finds no support in the authorities. Prior to 1933, it had been held that the presence of a stenographer was unauthorized and would invalidate an indictment. *United States* v. *Goldman*, 28 F. 2d 424 (D. Conn.). For this reason

Congress, in 1933, provided that no indictment should be deemed insufficient "by reason of the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity * * *". Act of May 18, 1933, 48 Stat. 58. Rule 6(d) continued this policy by providing that "for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session".[9] Significantly, Rule 6(d) does not require that a stenographer must be present or that the testimony before the grand jury must be transcribed. This should be contrasted with Rule 6(c) which does require the keeping of a record by one of the jurors of the number of jurors concurring in the finding of every indictment.[10]

Moreover, when Congress enacted the Court Reporter Act (now 28 U.S.C. 753(b)(1)), it provided that the reporter should record verbatim "all proceedings in criminal cases had in open court". It imposed no requirement for verbatim records of grand jury proceedings.

In view of the presumption of regularity which attaches to grand jury indictments (see *Costello* v. *United States*, 350 U.S. 359) and the limited situations in which grand jury minutes, even if in existence, need be produced (see *Pittsburgh Plate Glass*

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[9] The 1933 statute was repealed when superseded by Rule 6(d).

[10] It was recognized by the rule-drafting committee that in many districts grand jury minutes were not kept. See *Federal Rules of Criminal Procedure*, New York University School of Law Institute—Proceedings, Vol. VI (1946), pp. 179-181.

Co. v. *United States*, 360 U.S. 395) it cannot be said that a record of grand jury testimony is necessary for due process. The argument that such records should be required is a matter for Congressional consideration or for the rule-making power. No such requirement has thus far been imposed under existing law.

4. The petitioners group together several contentions which they claim show denial of a fair trial. All are without merit.

(a) The failure to grant a severance was not prejudicial, for the reasons discussed above as to the single continuing nature of the conspiracy. These counts of the indictment charging the co-defendant Spalazzo with activities involving Stolper after 1952 were dismissed and no evidence was heard concerning them.

(b) Having argued that they were entitled to a severance, the petitioners then contend that the indictment "fragments" the conspiracy because a previous indictment had been returned against eight of the co-conspirators. Aside from the fact that the petitioners could not have been tried on an indictment in which they were not named, it is apparent that all that occurred was that the information received from conspirators who pleaded guilty to the first indictment was then used in obtaining the second indictment.

(c) The trial judge properly denied the motion for a bill of particulars. Count I of the indictment sets forth the nature of the conspiracy, the plan and purpose of the conspiracy, and the part played by the

individual defendants in the alleged activity contemplated by the conspiracy, together with six alleged overt acts allegedly committed by the various members of the combine. The substantive counts of the indictment are as specific as possible without pleading evidence. Each count names the receivers or thieves, as the case may be, and describes in detail the property involved and the date on which the offense occurred.

(d) In regard to the motion for discovery and inspection under Rule 16, the government conceded the right of the petitioners to inspect and copy or photograph all books, papers, documents, records, or other tangible objects obtained from or belonging to the petitioners, or obtained from others by seizure or by process, and the attorney for the petitioners was permitted to review these records. The government successfully resisted, prior to trial, the efforts of the petitioners to inspect the grand jury testimony and the statements given to government agents by the petitioners. However, the trial judge, during the trial, directed whatever grand jury testimony the government possessed which had been given by any witness it called to be turned over to the defense.

(e) The petitioners complain that the charge to the jury was incorrect because the trial judge failed to state that a reasonable doubt could arise from a "lack of evidence" as well as "from the evidence." The trial judge, after charging the jury that the defendants were presumed innocent, and that it was "the Government's burden to pierce that mantle, tear down that cloak of protection, and satisfy [the jury]

beyond a reasonable doubt of the truth of the charges * * *," went on to state (R. 828-829):

> What is a reasonable doubt? It has been defined as an honest doubt that remains with you as to the guilt of a particular defendant after considering all the evidence. It is the kind of doubt that would make you hesitate to act in matters of importance to you in your daily life. It must arise from the evidence and must remain after you have had a full consideration of the case. If you have a reasonable doubt, an honest reasonable doubt, after considering all the evidence, the defendants are entitled to the benefit of that doubt and must be acquitted.

The trial judge was not bound to tell the jury that a cup which is half full is also half empty. The petitioners complain that this charge was needed to bring to the jury's attention the failure of the government to call as a witness Mr. Nat Suskin (petitioner Sussman's partner in the enterprise in 1954) who might have had some information on the guilty knowledge of the defendants, but the petitioners could have called Mr. Suskin as a witness, if his testimony was thought to be favorable.

The petitioners also complain that there was no cause for charging the jury about circumstantial evidence. There was need for that charge in view of the evidence introduced to corroborate the testimony of the guilty knowledge of the petitioners such as their presence at the sponger's, the removal of the various markings, and the use of a fictitious name to facilitate the transactions.

(f) The petitioners complain that the trial judge allowed improper direct examination of the prosecution witnesses, but no instances are singled out and relied upon as error. The argument seems to be that the testimony of Weiner and Lichtman was unfavorable to the petitioners. There were instances where a government witness was allowed to state why he did a particular thing (R. 53, 58-59, 71-72, 109-110, 495-497, 571, 572, 651). Objections were sustained in some instances (R. 109, 272). This is far from establishing that the trial was not conducted in an impartial manner, especially when it is considered that trial of the case took thirteen days.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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